No. 147.

Brief of Wolcott & Vaile for Appellee

IN

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THE SUPREME COURT

OF THE

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY, *Appellant*,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY, *Appellee*.

No. 147.
(16,237.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

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STATEMENT.

The relative positions of the surface boundaries of the several mining claims to be considered in this controversy are shown on Exhibit "A," facing page 10 of the printed record.

The mineral deposit here in dispute lies at great depth under the surface of the Del Monte claim (lot 7,356), and on the dip of a vein which

has its apex in the Last Chance claim (lot 7,263A); it also lies between two parallel vertical planes, indicated by dotted lines on said Exhibit "A;" one of said planes being drawn downward through the north end-line of the Last Chance claim extended westerly, and the other drawn downward through what is called the "north compromise line," as shown on Exhibit "B" in the record. This north compromise line is drawn approximately through the point where the apex of the vein, in its southerly course, passes out of the patented *surface* of the Last Chance claim.

By an examination of Exhibit "B" in the record, it will be seen that certain of the Last Chance workings are within the disputed territory, to wit: parts of the fifth, sixth and seventh levels, and all of the eighth and ninth levels. The same Exhibit reveals the fact that the vein, in its downward course, passes the vertical east boundary of the Del Monte claim, and, therefore, passes under the Del Monte surface at an elevation (662.2 feet) 467 feet lower than the collar of the Last Chance main shaft (1,129.7 feet), and 672 feet lower than the surface at the Del Monte shaft (1,334.6 feet). The vein rapidly descends to greater depths as it penetrates Del Monte territory.

The ultimate question for solution is, whether the appellee, as the owner of the patented Last Chance claim, or the appellant, as the owner of the patented Del Monte claim, is entitled to that part of the Last Chance vein lying under the Del Monte surface and between the two vertical planes above described.

As factors in this problem, the Circuit Court of Appeals submits the following

QUESTIONS.

"1. May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location, for the purpose of defining for, or securing to, such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

To this question the appellee would answer "Yes."

"2. Does the patent of the Last Chance lode mining claim, which first describes the rectangular claim by metes and bounds, and then excepts and excludes therefrom the premises previously granted to the New York lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted *surface* of the Last Chance claim?"

To this the appellee would answer "Yes."

"3. Is the easterly *side* of the New York lode mining claim, an "end-line" of the Last Chance lode mining claim, within the meaning of Sections 2320 and 2322, of the Revised Statutes of the United States?"

To this question, the appellee would answer "No."

"4. If the apex of a vein crosses one end-line and one side-line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side-line of his location?"

To this the appellee would say: "Yes, to any depth, and at least for such horizontal length, measured from the vertical plane of his end-line, as he has horizontal length of apex within his location."

"5. On the facts presented by the record herein, has the appellant the right to follow its vein downward beyond its west side-line and under the surface of the premises of appellant?"

The appellee contends that this question should be answered, "Yes."

BRIEF AND ARGUMENT OF APPELLEE.

There is no difference between the parties to this controversy as to the facts upon which the case must be determined; there is a radical difference between them as to the law applicable to the facts.

With very great respect for the learning and ability of the counsel for the appellant, we nevertheless must venture the opinion that they are seeking to revolutionize certain principles of mining law, and to deprive the discoverers of mineral veins of the benefit of their discoveries, and transfer such benefit to surface owners of adjacent claims who are not discoverers, but who would thereby reap the reward of the diligence, skill and success of their neighbors.

The principal fallacy in the argument of appellant results, as we think, from ignoring the plain provisions of the statute of the United States, relating to mining locations, and in applying to the boundaries of *patented surface* those principles which the law applies to *lines of location.*

The diagram annexed to this brief and marked "Fig. A" correctly shows the true relations of the boundaries of the Last Chance, the Del Monte and the New York lode mining claims, and also illustrates the portion of the vein in controversy.

The appellee, as the owner of the Last Chance

claim, owns the apex of the Last Chance vein, from the north end-line of said claim, southerly to the New York claim, and it claims to own as much of the vein, for its entire depth, as it owns of the apex. The trial Court held this contention of the appellee to be well founded.

In "Fig. A," the portion of the apex owned by the appellee is shown by the line *m—x;* the fine parallel lines represent the descent of the vein into the earth and under the surface of adjacent property; the letters *m—x* and *n—y* will show the portion of the vein claimed by the appellee; the portion thereof now in controversy is that which lies under the surface of the Del Monte claim. The Del Monte has no portion of the apex of the vein within its surface boundaries.

It may be stated, in passing, that the line *x—y*, designated in the record as the "north compromise line," became the southern boundary of the appellee's claim of ownership on the dip of the vein, as the result of contracts and conveyances between the owners of the Last Chance, on the one part, and the owners of the New York on the other part. (See *Del Monte M. and M. Co. vs. New York and Chance Mining Co.*, 66 Fed. Rep., 212.)

In discussing the questions propounded by the Circuit Court of Appeals, we venture to lay down three distinct propositions, to which we shall address our argument, and which we think are well founded in law. Even if the second proposition alone be decided in our favor, it ends the present controversy; but in order that we may meet the various theories presented by the counsel for appellant, we shall discuss each of the three.

By the word "location" or "claim," as used in the following discussion, we mean all that is included within the exterior boundaries of the "sur-

vey lot," without any exclusion in favor of senior appropriators. It is a familiar fact that the "first" or "original" location of a claim may be loosely and inaccurately laid; but the location may be amended or revised, and the "location," in its final form, just preceding application for patent, including all that the locator would be entitled to hold if there were no overlapping senior claims, is the "location" here referred to. Such "location," or "claim," may equal, but cannot exceed, 1,500 feet in length along the vein or lode, and its surface cannot (in Colorado) exceed 300 feet in width.

The propositions we would lay down are as follows:

(1) What are the "end-lines" of a lode mining claim, is to be determined, not by the lines of *patented surface*, but by the lines of the claim *as located*.

(2) If the apex of a vein enters a *location* across one end-line thereof, the locator will own as much of the vein, at any depth, as he owns of its apex, *subject only to superior rights of other apex claimants*.

(3) Where several overlapping claims are located along the apex of a vein, the senior claimant holds as much of the vein, at any depth, as he owns of the apex within his location. The next in rank holds as much of the vein, at any depth, as there is of its apex within his location, *except as to the portion thereof owned by the first in rank*, and so on with subsequent claimants.

We shall take these propositions up in the order here presented:

I.

What are the "end-lines" of a lode mining claim, is to be determined, not by the lines of patented surface, but by the lines of the claim as located.

It is apparent, not only from the "reason of the thing," but from the very letter of the statute, that in the grant of lode mining claims, the substance of the grant is the mineral-bearing vein; that the grant of surface is merely accessory and incidental and for the purpose of making more available the grant of mineral beneath the surface.

"No location of a mining claim shall be made until the discovery of a *vein or lode* within the limits of the claim located."

Revised Statutes, Section 2320.

"A mining claim * * * may equal, but shall not exceed, fifteen hundred feet along the *vein or lode.*" (*Ib.*)

No mining claim can take more than three hundred feet, or be restricted by local regulations to less than twenty-five feet "on each side of the *middle of the vein* at the surface." (*Ib.*)

"The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment," not only of the surface within the lines of their locations, but also of "all veins, lodes and ledges throughout *their entire depth*, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

Revised Statutes, Section 2322.

These words of the statute plainly show that

its purpose is to grant the *mineral* contained in veins, to whatever depth they may descend, and to a limited horizontal extent.

This Court plainly recognizes this clear intention of the statute, when it says:

"Our laws have attempted to establish a rule by which each *claim* shall be so many feet of the *vein* lengthwise of its course, to *any depth* below the surface, although laterally its inclination shall carry it ever so far from a perpendicular."

Mining Co. vs. Tarbet, 98 U. S., 468.

This Court again says:

"A section of the *lode* within vertical planes drawn downward through the lines *marked on the surface* was designated as the grant to the original locator, but as the vein in its downward course might deviate from a perpendicular and pass out of the side lines, the right was conferred to follow it outside of them, but within planes through the end lines drawn vertically downward and continued in their own direction."

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 205.

It is equally apparent from the nature of things and from the statute, that the lines which shall furnish the basis for defining and limiting underground rights, must be laid upon the surface.

The claim cannot exceed fifteen hundred feet along the vein or lode, nor be more than three hundred feet (in Colorado, 150 feet) on each side of the middle of the vein "at the surface."

Revised Statutes, Section 2320.

"The end-lines of each *claim* shall be parallel to each other." (*Ib.*)

Extra-lateral rights on veins, lodes or ledges

are "confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the *end lines* of their *locations* so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

Revised Stats., Section 2322.

This Court has said:

"This means the end-lines of the *surface location*, for all locations are measured on the surface."

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 206.

A slight examination of the statute also clearly shows that when the statute requires, in Section 2320, that "the end-lines of each *claim* shall be parallel to each other," it means the end-lines of each claim *as located;* or, in other words, the end-lines of the *location* shall be parallel. And for the purposes of ascertaining the surface lines which determine rights, the word "location" and the word "claim" in the statute must be taken as synonymous.

Thus, the statute having provided, in Section 2320, that the end-lines of each *claim* shall be parallel to each other, then proceeds, in Section 2322, to define the rights of "the locators of all mining *locations*," giving them the "exclusive right of possession and enjoyment of all the surface included within the lines of their *locations*, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines [that is, of the *locations*], extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface *locations;* but

their right of possession to such outside parts of such veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end-lines of their *locations*, so continued in their own direction that such planes will intersect said exterior parts of such veins or ledges."

Certainly, there is no room for debate on the proposition that the end lines of the "location," referred to in Section 2322, are the end-lines of the "claim," which, by Section 2320, are required to be parallel to each other.

These parallel end-lines, therefore, are those which mark the terminal boundaries of the claim as asserted by the locator and as marked upon the ground. They limit both his surface and his underground rights, but are necessarily and of course subject to any superior rights, either on the surface or underground, possessed by another; which, as we shall hereafter show, is the reason why, in the form of patent used by the Land Department of the United States, the descriptions are made by way of *exclusion* of prior grants.

The statute very plainly recognizes a distinction between the claim as located, to which alone all provisions relating to end-lines apply, and the surface that shall be subsequently patented. When we turn to Section 2326, Revised Statutes, this distinction becomes very apparent. In the location of mining claims, as a result of the requirement that locations shall have parallel end-lines, and because the validity of conflicting locations is, for some time after attempted discoveries, a question of uncertainty, mining locations do overlap each other in all conceivable directions. A mere glance at a map of the mining locations of Leadville, of Aspen, of Creede, or Cripple Creek, or of

any other mining camp, will show how the locations, and even the officially surveyed locations, do thus conflict one with another, sometimes several locations covering the same surface area.

This necessary consequence of the requirements of the statute as to the way of locating mining claims was recognized by the law makers in providing for the settlement of adverse rights, in which a clear distinction is made between the claim as located and the surface as patented. If a locator makes application for his entire claim as located, and other persons are claiming the same territory, or a portion thereof, the law provides for the institution of adverse proceedings to determine by judicial action the right of ownership; and in such cases it is provided in Section 2326 of the statute, that "a patent shall issue * * for the *claim*, or such *portion thereof*, as the applicant shall appear, from the decision of the Court, to rightly possess. If it appears from the decision of the Court that several parties are entitled to *separate and different portions* of the *claim*, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor General, whereupon the Register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office * * * and patents shall issue to the *several parties* according to their *respective rights*." Now, Section 2320 had provided that the end-lines of *claims* should be parallel to each other; Section 2322 had provided that the extra-lateral rights should be bounded by vertical planes drawn through these parallel end-lines of the claim, all referring to the *location* and the extent of claim as marked by the locator; and the provision in relation to patents provides that this claim may, for

purposes of patenting, be cut up into parts, so that one portion may be patented to one and another portion may be patented to another. It is an axiom that a part cannot equal the whole, and there is nothing in the statute, from beginning to end, which applies to boundaries of the patented fragments of surface, the rule requiring parallelism in end-lines; nor is there anything to be found in the statute which applies to the lines of patented surface the rules which control the lines of location.

The principles which we have been here presenting and discussing are well illustrated by the particular case in hand. The located claim called the Last Chance is a rectangle, having absolutely parallel end-lines, and being described as survey lot 7263 A. This is manifestly a location and a claim to which the rule as to parallelism in end-lines applies. It applied for patent for the entire surface area included within its rectangular survey lot. The owners of the New York were claiming a portion of the same territory included within the Last Chance claim. They brought an adverse proceeding under Section 2326 of the Revised Statutes. Litigation was had upon the subject, and as a result of the litigation, a *portion* of the Last Chance *claim* was awarded to its locators, and the *portion* of the claim so awarded to them was patented. The ownership of the located claim, however, was not thereby reduced, either as to surface or vein, *except* to the extent of the portion awarded to the New York.

As we shall hereafter see, upon another branch of the subject, the law and the patent gave to the owners of the Last Chance all rights which their location of survey lot 7263 A (being the entire rectangle with parallel end lines) would give them, except that which, by the law and by the patent,

was excluded in favor of the New York lode mining claim, which had instituted such adverse proceedings.

It is very apparent that, in the absence of any adverse proceedings, the Last Chance application for patent would have taken the whole rectangle which marks the location of the Last Chance, together with the entire vein, to any depth below the surface, and for the full distance, horizontally measured, from end-line to end-line of the Last Chance location. The New York, however, is an adverse claimant to a part of the property for which the Last Chance was making application for patent. The New York succeeds, and, to the extent that the adjudication goes in favor of the New York claim, there is an exclusion in the patent from the property which would otherwise be conveyed to the Last Chance.

It is argued very strenuously by counsel for appellant that "the end-lines of a lode mining claim are those which lie crosswise of the apex of the vein," and that "they must be actual and not imaginary;" by which last expression counsel mean that they must lie upon previously unappropriated surface. The fallacy of the first part of the proposition again lies in the use of the word "claim." We do not for a moment debate the proposition that, where two parallel lines of a claim cross the apex of a lode upon the surface, they are the "end-lines" of the claim, but the *claim* referred to is the *located claim*. Counsel use it in the sense of the patented surface. But the statute clearly shows that patents may apply to *part* of the claim, and that to one may be given a portion of the claim and to another a "separate and different" portion.

The fact that the lines of different locations

cross each other does not make the lines of the junior claim any the less actual. A line itself does not have either breadth or thickness. Its existence does not invade any possession or occupancy of a senior claimant. It is but a method of designation so as to show the limits of *underground* as well as of surface rights; and while, of course, such boundary lines of the junior claimant, so far as they overlap or lie upon a senior claim, cannot and do not take from the senior claimant any right of surface or any possession or enjoyment of surface within the conflict, they may, and generally do, become essential to mark the extent and limitations of underground rights of the junior claimant, which, as to any conflict, are, of course, subject to an exclusion in favor of the senior claimant.

So far as the present case is concerned, the proposition we are here discussing is not affected by the statutory provision that one who has appropriated a portion of the public mineral domain and complied with the mineral laws, has the "exclusive right of possession and enjoyment of all the surface included within the lines of his location." This has never been held in practice to prevent the entending of a survey over previously appropriated territory for the purpose of defining a second location, which second location is of course subject to an exclusion in favor of the first locator. Even if it were true that the owner of patented surface might, under this statute, prevent a subsequent locator from even planting a stake upon the patented surface for the purpose of marking the limits of underground rights, which may not be adverse to the rights of the senior patentee, yet such a question is not involved in the case at bar, nor is it in practice a difficulty which locators have to contend with. In the present case, the

locations *were* made; they were surveyed under the authority of the Surveyor General; there is no question as to the extent and boundaries of the claims as located and the question involved here is as to which of certain known lines mark the rights of the contesting parties. The boundaries of the *location* are as well known, and as distinctly described as are the boundaries of the patented surface.

Our contention is, that the boundaries of the recorded and *located claim* (the exterior boundaries of the "survey lot") are the lines referred to in Sections 2320 and 2322; that it is the end-lines of the *location* thus made that must be parallel, and which determine extra-lateral rights, and that the requirement of parallelism has nothing whatever to do with the surface lines which mark the *fragments* of a claim that may be patented to the one party or to another.

We here insert, as it does not appear in the record, the opinion of the Supreme Court in dismissing the bill in the present case, adopting it as a part of our argument, so far as it applies to the question now under consideration. It is as follows:

DECISION DISMISSING BILL.

Hon. Moses Hallett, Judge:

"I think that the lines of a claim may be located wholly or partly upon other territory--that is, territory which is not open to location, for the purpose of determining the extra-lateral questions. In other words, the locator, in order to make a valid location, is bound to locate his lines so as to be of a rectangular form, and, if in so locating them he gets upon the territory of other claimants, whether at the time of such location the claims adjacent

have or have not been patented, his lines are well laid with reference to the territory actually open to that location. As in the case supposed, if the territory subject to location, as the Last Chance, at the time the patent for that claim was issued, had been of triangular shape, I think that in order to acquire that territory the location would of necessity be rectangular, and even if the lines fell upon other claims which had already passed to patent, the result would be the same; so that in this instance the circumstance that a part of each of the side-lines and a part of the south end-line is upon the New York claim is not controlling in the determination of this question.

"We consider, however, under the Last Chance patent the respondent owns the apex, and we can allow the extra-lateral right upon the course of the end-lines within the principle announced in the New York case lately decided. [66 *Fed.* 212.] There is one end-line—the north end-line—which is well located, and the other is to be placed where the vein leaves the location by its apex in the corresponding position in the course of the two end-lines, and the circumstance that the south end-line is in part upon other claims, or wholly upon other claims, does not affect the question of its force and effect as an end-line. We can easily conceive of a piece of ground being in a situation, on account of other locations adjacent to it, which would call for pretty nearly all the lines, both end-lines and side-lines being upon other claims; I think they would still be effective as to the territory actually acquired under the location, although placed upon other claims.

"I comprehend the force of the argument that all lines located upon other claims of earlier date are invalid because they are not upon territory open to location; but I do not believe that to be a correct position. I think that, the act of Congress requiring that a claim shall be of a certain form (and the locator in order to secure the territory which he wants will be compelled to conform to that shape), he may put his lines so as to take the territory to which he may be entitled rather than upon the ter-

ritory itself. I notice in these cases over on the Pacific coast, as the Tyler cases and the like, they have run their lines in the most extraordinary ways, and in many cases they have nothing at all that can be called end-lines or side-lines, which was the same in the "Horse Shoe," or the Stone location; but that has not been the practice in this State; we have always been making the location—always at least since the Act of 1872—we have always been making them rectangular in form, even though it carried the lines upon other locations. Upon that, I think, the case is controlled by the rule which was laid down in the New York-Del Monte case recently, and that the respondent here may claim upon a line parallel to the end-lines where the vein leaves that location. That I understand to be identical with the north compromise line in the New York case; so that no right can be allowed in this case as to the territory north of that line. That, I believe, is what is sought."

II.

If the apex of a vein enters a location across one end-line thereof, the locator will own as much of the vein at any depth, as he owns of its apex, subject only to superior rights of other apex claimants.

Various attempts have been made to refine away the provisions of the statute relating to extra-lateral rights, and to give to claimants of surface possessing no apex of a vein, the benefits resulting from the discovery of such apex within adjacent territory by others; and an attempt is made in this case to deprive the discoverers of the Last Chance claim of the benefit of their discovery, because their vein, after crossing one of the end-lines of the Last Chance and running substantially parellel with its side-lines and along the center of their claim, passes into the territory of a senior claimant across a line which, by reason of the nature

of the location of the senior claimant, cuts the Last Chance claim obliquely. It is apparent that the Last Chance *location* is well laid as regards the vein, and the course which the New York side-line takes across the apex is by reason of the location of the New York, and not by reason of the location of the Last Chance. The east side-line of the New York which marks, by reason of priority of claim, a boundary for the patented *surface* of the Last Chance, was not located by the Last Chance discoverers, nor had they any voice in fixing its direction. It is but an obstacle which interrupts what would otherwise be their right to follow upon the apex of this vein for a further distance of more than six hundred feet within the lines of their claim as laid. Now, our proposition is—and the proposition which was sustained by the trial Court—that the apex of the vein, crossing as it does the north end-line of the Last Chance, and pursuing a course substantially parallel with the side-lines of the Last Chance through the center of that claim, the owners of the Last Chance are entitled to at least as much of the vein in horizontal extent, for its entire depth, as they thus have of its apex.

For the purposes of the argument, however, the question may be discussed without reference to the seniority of a conflict claim, and for the sake of presenting the legal questions involved, we may take "Fig. B," hereto attached, and the line of apex of the New York claim, being the senior claim, for the purpose of determining what the extra-lateral rights are where the apex of the vein does not cross both end-lines. By an examination of "Fig. B," which correctly represents the relative position of the locations, it will appear that the line of the apex of the New York claim, marked by the letters j—j, crosses the southern end-line of the New York,

passes northerly substantially parallel with the side-lines of the New York for four-fifths of the length of the claim, and then passes out of the easterly side-line. Our contention under such circumstances is that the New York claim will have as much of the vein for its entire depth as it has of its apex, and that the lines j—j and k—k will represent the vein upon its dip which is thus held by the New York. The statute relating to rights under these conditions, being Section 2322 of the Revised Statutes, seems so plain as not to require construction. In the language of Mr. Justice Field, "This section appears sufficiently clear on its face; there is no patent or latent ambiguity in it." It is very clear that the statute, under such circumstances, purports to give at least "*all* veins, lodes and ledges throughout their entire depth, the top or apex of which *lies inside* of such surface lines extended downward vertically;" and no distinction is here made between the original discovery upon which the claim was based and the original location made, and other veins which have subsequently been found to apex within the surface; but it would seem to give as much of all such veins, lodes and ledges, for their entire depth, as they possess of apex within their surface lines; this right of possession being always confined to such portions as lie between vertical planes drawn downward vertically through the end-lines. It is very apparent, therefore, that, taking the New York claim for illustration again, no rights on the strike or dip can extend south of a plane j—k drawn through the south end-line of the New York claim; that plane becomes the base for measurement of the rights which the claim possesses. It possesses of the apex within the surface lines, all that portion shown by the line j—j. Assuming that the

line j—j is in horizontal distance eleven hundred feet long, if the northern end line of the claim as located had been drawn at the point j, where the apex leaves the side-line, then no question could arise, but that the figure j—j, k—k would represent the extent of vein on its descent into the earth to which the New York claim would be entitled. Now, upon what principle, either of law or of equity, or under what theory of construction of the statute, can it be said that, because the surface lines extend beyond the northern line j—k, the rights, which would be possessed if it had stopped at the northern line j—k, have been destroyed? The length of the claim *may* equal, but shall not exceed fifteen hundred feet along the lode; there is no minimum limit fixed by the statute; the New York, as located, takes eleven hundred feet along the lode. This certainly is within the right given by the statute. The fact that the remaining four hundred feet of the surface is not *along the lode*, while it may, under certain conditions, and at a certain stage of proceedings, possibly defeat the title to this additional four hundred feet of surface, yet on what principle could it take away the rights of the locator to the extent that the claim *is* located *along the lode*.

We ask the attention of the Court to the case of *Del Monte Mining and Milling Co. vs. New York and Chance Mining Co.*, 66 Fed. Rep., 212, where this very vein of the New York was in controversy between its owners and the present appellant. We submit that the views of the Court in that case are well founded, and are entirely consistent with any decisions made as yet by this Court. The Court, after citing the Flagstaff case and the Amy-Silversmith case, says:

"The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode, shall be end-lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location and within its side-lines a distance of 1,070 feet. It is conceded that the south end-line of the location is well placed, and all parts of the lode covered by the location are ***within*** the end-lines as fixed by the locator. The difficulty arises from the circumstance that the *location* extends in a northerly direction about 280 feet beyond the point where the lode diverges from the side-line. No reason is perceived for saying that this mistake in the length of the *location* should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end-line at the point of divergence, or elsewhere, because the Court cannot make a new location, or in any way change that made by the parties. * * * This, however, is not necessary. We can ***keep within the end-lines*** fixed by the locator in respect to any extra-lateral right that may be recognized without drawing any line; and if there be magic in the word "line," it will be better not to use it.

"In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be 1,070 feet. *At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end-lines by measuring the same distance from the south end-line produced.* In this proceeding there is no departure from the end-lines of the New York location as fixed by the locator, and there is no new line of location drawn for any purpose whatever. We keep entirely within the end-lines of the location, as required by the statute, and the circumstance that we are somewhat short of the north end-line does not in any way affect the principle to be followed in construing the statute."

We respectfully ask the attention of the Court to the full statement of facts and discussion of the subject in this decision by Judge Hallett, which we respectfully insist is a sound enunciation of the law appertaining to the subject.

The question as to extra-lateral rights, where the apex crosses one end-line and one side-line of a location, has not been, in express terms, decided by this Court, and is, therefore, claimed to be an open question; but we respectfully submit it is an "open" question only because, since the Amy-Silversmith case, very vigorous efforts have been made by persons owning surface but not apex, to restrict extra-lateral rights, and because the question presented by them has *not* been expressly decided by this Court. As we look at the matter, it is not a question which should be considered as an open one, because of the plain meaning to be given the statute bearing upon the subject. In the one case in which the question was brought before this Court, the Court said:

"It will be seen from the diagram that according to the original location of the Tyler claim, the vein enters through an end and passes out through a side line * * *. It has been held by this Court in the cases heretofore cited, that where the course of a vein is across instead of lengthwise of the location, the side-lines become the end-lines, and the end-lines the side-lines; but there has been no decision as to what extra-territorial rights exist if a vein enters at an end and passes out at a side-line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law, that the owner of real estate owns all above and below the surface, and no more? Or may the Court rely upon some equitable doctrine, and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?"

Last Chance Mg. Co. vs. Tyler Mg. Co., 157 U. S., 683, 695.

As we look at the law governing extra-lateral rights, this is a case for which provision has been made by statute, and it is not necessary to rely upon some equitable doctrine, but the extra-territorial rights of the parties rest upon the statute itself, for it is unquestionable that the statute gives an extra-territorial right as to all veins the apexes of which lie *within* the end-lines. It is very clear to our minds that if the apex crosses one end-line and runs within the claim for some considerable distance, such apex is *within* the end-lines, for to be *within* does not necessarily mean that it must also *pass out* of both end-lines. Under the statute, the owner of the claim owns the vein "the top or apex of which lies *inside* of the surface lines." Certainly, the apex of this vein does lie inside the surface lines of the New York, and it would be, in our opinion, a strange modification of the statute, in the nature of judicial legislation, to say that the apex must not only thus lie inside of the lines, but must extend to, so as to pass outside of, the end lines of the claim.

Of course, by the apex of a vein which is to lie inside of the claim, is not meant the whole line or apex of the vein used in a geological sense, because the vein may extend for miles, and by the very terms of the statute the claimant cannot take more than 1,500 feet along it. Therefore, in any view of the statute, it must be contemplated that there is included within the surface boundaries of the claim all or *some portion* of a geological vein which may physically be of greater or less extent. If it is of greater extent than 1,500 feet in length, and both end-lines of the claim cross

it, or two parallel lines of the claim cross it, then such parallel lines mark the portion of the lode or vein which the locator has obtained. If the vein is physically shorter than 1,500 feet, as it well may be, or if less than 1,500 feet of its apex is within the surface lines, entering, however, across one end-line, then certainly the conditions exist which, under the statute, give the right to follow the vein upon its dip under the surface of adjoining territory.

In the very case in this Court which has established that parallel side-lines crossing the course of the apex would become the "end-lines" which bounded the claimant's rights, the Court, nevertheless, used expressions to show that any absolute and certain relation of surface lines to apex was not contemplated by the statute. Thus, in that case, the Court said:

"Slight deviation of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein, but, if it should make a material departure from his location and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein *further than it continued substantially to correspond with it.*"

Mining Co. vs. Tarbet, 98 U. S., 463, 468.

Applying this language to the case of the New York vein, the location is on that lode or vein *so far as it continues substantially to correspond with it.* If the location is on the lode or vein, then the apex of that lode or vein is *within* the location; but if the apex is within the location, the statute gives the right to follow such vein upon its dip under the surface of adjacent territory.

It is to be noted, also, that the extra-lateral

rights given by the statute apply not only to the originally discovered vein upon which the location was based, but to *all* veins, the apexes of which may be within the same surface; but, to anyone at all familiar with mining conditions, it is apparent that such veins will take different courses, and it would be a rare circumstance that different veins within a mining location should all be parallel to each other, and should all cross the end-lines of the location. The Supreme Court has remarked:

"It often happens that the top or apex of more than one vein *lies within* such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side-lines of the location must be bounded by planes drawn vertically through the *same end-lines*. The planes of the end-lines cannot be drawn at a right angle to the courses of all the veins if they are not identical."

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 196, 207.

The only way, we respectfully submit, by which the rights granted by the statute can be made available is, that, as to all of such veins, whatever angles they may take, the locator has at least as much of the vein at any depth, upon its dip as he has of its apex within his surface boundaries.

The Circuit Court of Appeals for the Ninth Circuit has fully sustained our contention upon this subject, using this language:

"The learned justice who wrote the opinion in the Horse Shoe case, when he said that the parallelism of the end-lines 'is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side-lines,' did not mean that it was essential to such right that such lode should extend in its length from *one end-line to the other* of the location.

If the lode in question, instead of extending into the Last Chance location had abruptly broken off within the surface lines of the Tyler near the point where in fact it crossed the line, there could certainly be no question as to the right of the Tyler to follow the lode or vein in its downward course for its entire depth outside of the vertical planes drawn through the side-lines. The fact that it continued its course and crossed the side-line does not in any manner change this principle. In either case the locator is entitled to the same rights."

Tyler Mg. Co. vs. Sweeney, 54 Fed. Rep., 284, 292.

The Judge who wrote the opinion in the last case cited had occasion to decide a similar question on the circuit after the decision of the Supreme Court in the case of *King vs. Amy Silversmith Mining Co.*, in which he held the same views, and that they were not inconsistent with the views of the Supreme Court in the case last mentioned.

See—

Consolidated Wyoming Gold Mining Co., vs. Champion Mining Co., 63 Fed. Rep., 540, 547.

We respectfully insist that, upon the very plain meaning of the statute, and upon the construction given to it by those judges who have had long experience in the construction of mining law, it must be concluded that the first locator along the apex of a vein which crosses one of his end-lines, will be entitled to the possession of the vein to any depth, and to a horizontal extent measured from the vertical plane drawn through such end-line, corresponding to the horizontal extent of the apex, measured from the same end-line, which he has within his surface location.

While this proposition, as thus stated, is true, as to the first locator on the apex, yet, as to a second or subsequent locator, it must be subject to a modification, and that is to an exclusion to the extent of the rights actually possessed by the senior locator.

The appellant, among the various figures used to illustrate its theories in the Court of Appeals, had one designated as "Fig. 3," in which the apex is shown to cross one end-line of the "Del Monte," and to pass out of its side-line, and the apex of the same physical vein is shown to cross the south end-line of the "New York" claim and to pass out of its west side-line near the northwest corner; the "Del Monte" being the senior of the two claims according to the hypothesis suggested. We call attention to the blue-print marked "Appellant's Figure 3, Elaborated," attached to this brief, to illustrate the resultant rights under such circumstances. The line f—f would show the portion of the apex possessed by the "Del Monte" entering the claim across its south end-line. As the senior claim, it would hold as much of this vein upon its dip as it has of the apex, and, therefore, the lines f—f, g—g would mark the portion of the vein in its descent, to which the "Del Monte" would be entitled. If the "Del Monte" claim were not there, the "New York" would be entitled, by virtue of its location, to the full line j—j, showing the apex, and would be entitled to as much of the vein upon its descent into the earth as it has of the horizontal extent of the apex measured from the south end-line; and, therefore, the figure j—j, k—k would represent that which the New York would own if the Del Monte did not exist. The Del Monte, however, in such imaginary case, having certain apex rights, and being senior to the New York,

could not be deprived of the rights granted it, and that portion of the vein possessed by it would be necessarily excluded from the property belonging to the New York. The New York would own all of the vein j—j, k—k, except the strip running crosswise through it, marked by the lines f—f, g—g. We think this is the logical and necessary deduction from the statute, and that our proposition is well maintained, to wit, that "if the apex of a vein enters a location across one end-line thereof, the locator will own as much of the vein at any depth as he owns of its apex, subject only to superior rights of other claimants."

III.

Where several overlapping claims are located along the apex of the vein, the senior claimant holds as much of the vein at any depth as he holds of the apex within his location. The next in rank holds as much of the vein at any depth as there is of its apex within his location, except as to the portion thereof owned by the first in rank; and so on with subsequent claimants.

We think this proposition is a necessary outgrowth of the preceeding discussion, but its enunciation and elucidation are important, and we think that it fully meets every possible condition that may arise in the conflict of ownership in mining claims as to extra-lateral rights on the dip of the same vein.

Using again as a premise the proposition that the essential thing intended to be conveyed to the discoverer of mineral upon the public domain, is the mineral itself, and that a lode to its entire depth is granted to the locator of the vein, limited only by the parallel end-lines of his location; that

these end-lines relate to the *claim* as marked upon the ground, and not as the boundaries of the surface *portions* thereof *patented* to contesting parties, respectively; this proposition becomes a necessary deduction. It also explains why, under the law and in the patents of the United States, the method of granting is by description of the *entire location*, with an exclusion therefrom of the part previously granted to others.

"Fig. B," hereto attached, will illustrate the relations between the New York claim and the Last Chance claim as the result of the applications for patent and the adverse proceedings. The Last Chance application for patent covered, as we have already suggested, the entire rectangle known as lot 7263 A. An adverse proceeding was had by the New York, claiming by senior title as to the conflict territory. If the New York claim did not exist, then the Last Chance claim, by virtue of its location, would be entitled to the entire vein marked by the figures m—m, n—n; that is to say, it would be entitled to as much of the vein at any depth in the earth as it has of the apex of that vein within its *location*, which, in this case, would be co-terminous with the location itself. The New York, however, has in fact a portion of this apex, and is adjudged in the litigation to be the senior in rank. After the discussion already had, it is clear that of the vein the New York is entitled to the figure j—j, k—k; that is, to so much of this vein at any depth as it has of the apex.

The Last Chance *claim* included a "*section of the lode* within vertical planes drawn downward through the lines marked on the surface," with the right "to follow it outside of them, but within planes through the end-lines drawn vertically downward and continued in their own direction." (*Iron*

Silver Mining Co. vs. Elgin Mining Co., 118 U. S., 206.)

By the statute, Section 2326, a *part* of the claim may be patented to one, and a *part* of the claim patented to another. Manifestly, therefore, the Last Chance was entitled to and received as much of its claim, which included the whole "section of the lode" marked m—m, n—n, as was not granted to the New York; but as the rights of the New York on the vein are marked by the letters j—j, k—k, then all that was left after taking this out belonged to the Last Chance; and the Last Chance claim would possess not only that portion of the vein which upon "Fig. A" is indicated by the letters m—x and n—y, but would, under the law, be entitled to the whole section of the lode marked on "Fig. B," m—m, n—n, *except* that triangular portion of the same which is cut out by the intersecting lines j—k and m—n. These two claims covering the entire apex and the junior one being entitled to all that its location would call for, *except* that which is awarded to the senior location, resting upon the same vein, it becomes manifest that the rights given by the law are measured, not alone by the amount of apex which may be within the *patented surface* of the junior claim, but by the whole extent of apex within the surveyed *location* of such junior claim, subject only to the exclusion in favor of the senior claimant. It is upon this principle that the patents of the United States are framed; and the criticism of Mr. Rossiter W. Raymond, referred to by appellant results from an entire minunderstanding of what is intended to be conveyed by the statutes of the United States; the criticism entirely fails to meet the reason which prompts the Land Office in conveying by description of the *entire location*, and then *excluding* prior grants.

To further illustrate the philosophy of conveying mining claims by a description of the entire location, and by exclusion therefrom of senior grants within the same premises, we ask the attention of the Court to the three blue prints attached to this brief, and marked "Fig. C," "Fig. D" and "Fig. E."

In each of these figures the claim marked "A" is assumed to be senior in rank.

In "Fig. C" the *dip* of the vein is represented as being to the west, *i. e.*, on the convex side of the curved line of apex. Under the conditions thus illustrated, there would never be any conflict of right; because the south end-line of "A," and the north end-line of "B," *diverge*, as they follow the vein in its descent into the earth.

Suppose, however, that with the same course of apex, and the same relation of boundaries, it should be found, on development, that the dip of the vein is to the east, or on the concave side of the curved line of apex, as illustrated by "Fig. D." Now, there is a conflict of underground lines, and rights can be determined only by the rule of seniority. The senior claim "A," manifestly, has at any depth the entire length of vein between the vertical planes "a—a" and "b—b." If the claim "A" were not in existence, claim "B" would have, in like manner, at any depth, the entire length of vein between vertical planes "c—c" and "d—d." But "B," being junior, there is excluded from it so much of this section of the lode as has been already granted or reserved to "A." "B" has therefore much less of the vein underground than it has of the same vein on the surface. Its length of vein is rapidly diminishing, on descent into the earth, being bounded on one hand by the vertical plane "d—d," drawn through its own end-line, while in the other direction it is bounded by the

vertical plane "b—b," drawn through the end-line of the senior claim "A." In this case the rights of "B" are determined, and can be determined, only by describing its claim as a whole, and then excluding, either by express terms or by implication of law, such portion of the vein as already belongs to "A." In the case so illustrated, the resultant underground and surface rights of "B" are not coterminous, *i. e.*, bounded by the same parallel vertical planes, and the surface rights exceed in length the underground rights.

In "Fig. E," the course and dip of the vein are assumed to be substantially the same as in "Fig. C", but with the surface lines of the locations overlapping each other.

In this illustration, if the claim "A" did not exist, then "B", manifestly, would have the entire surface of its claim, and the entire section of the lode, at any depth included between the vertical planes "c—c" and "d—d". But "A" *does* exist, and its rights include all between planes "a—a" and "b—b."

Is not "B" entitled to everything which its claim would cover, *except* that portion thereof already granted to "A"? And how can "B" receive that to which it is entitled, except by describing its entire *claim* and the entire section of the lode included therein, and then excluding therefrom that which has been previously granted to "A"?

By this process, however, the surface rights of "B" are diminished more than its underground rights, and the length of vein underground to which it is entitled, (and plainly that means the section of the lode between the planes "c—c" and "d—d", not already owned by another) can be conveyed only by a description of the whole surface location, and of the corresponding section of the

lode, and then by excluding therefrom that *portion* of the surface and lode which belongs to "A".

A lode mining claim involves three dimensions: length, breadth and *depth*. The direction or extent of the *depth* cannot be known prior to development. The only practicable method of measurement prior to actual extraction of ores, must be by two dimensions, length and breadth, marked on the *surface*. But surely it is the purpose of the law to so apply these surface measurements as to give to the discoverer of the lode the full "section of the lode" which he claims, not already granted or reserved to another. The method of conveyance adopted by the Land Department accomplishes this purpose, and is the only method by which it can be accomplished.

Thus, the patent for the Last Chance lode mining claim, found in the record at page 4, describes first the entire rectangular tract marked "Survey Lot 7263 A." After having thus described it all, it expressly excepts that portion of the *ground* embraced in survey No. 7406, which is the New York claim, and excepts, also, that portion of the Last Chance vein and of other lodes and ledges throughout their entire depth, the *tops or apexes* of which lie *inside of the excluded ground*. We have already shown, however, that for instance, on "Fig. B," the portion of the vein in controversy which apexes within the New York, is marked by the letters j—j, k—k. Therefore, it it is only the part represented by that figure which is excepted from the section of the lode granted to the Last Chance. The grant, however, proceeds, near the top of page 6 of the record, as follows: "Said lot No. 7263 A (Last Chance location) extending 1,278.34 feet in length along said Last Chance vein or lode, *the granted premises in said lot* containing five acres and twenty-five

hundredths of an acre, more or less." So, we have here a distinction between the *survey lot* and the "granted premises," the latter referring to the surface acreage, while the lode which is conveyed is described as extending the full length of the rectangular location, excepting that part apexing within the *excluded surface*. Further on in the patent, and on page 6, the limitation upon the right of possession of the outside part of the vein is bounded not by parallel planes drawn through the patented surface, but is limited to such portions of the vein "as lie between vertical planes drawn downward through the *end lines of said lot 7263 A*, so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes or ledges." So that we have here the vertical planes drawn through the end-lines of the *location*, being the rectangular lot marked "7263 A," specifically mentioned as the lines which limit the subterranean rights of the Last Chance. The effect of the entire grant is, that it grants all of lot 7263 A, except that portion which had been conveyed under lot 7406; and it grants all of the lode apexing in lot 7263 A, except that part of the same which apexes in lot 7406. It follows, independent of any private conveyances and contracts, that the Last Chance lode mining claim would be entitled to the entire vein m—m, n—n, on its dip into the earth, except as to that part thereof previously appropriated by and granted to the New York, which would be the overlapping part of the figure shown by the letters j—j, k—k.

The appellants urge a proposition from Washburn on Real Property, which we accept *in toto*, and which, instead of affecting the validity of our argument, strongly supports it:

"As an exception is the taking of something

out of the thing granted, which would otherwise pass by the deed, it may be said in general terms that it ought to be stated and described as fully and accurately as if the *grantee* were the *grantor of the thing excepted.*"

3 Washburn on Real Property, page 431.

"Whatever may be passed by words of grant may be excepted by like words, and the same consequences attach to such exception as would have attached had it been a grant."

3 Washburn on Real Property, page 435.

These passages are cited by counsel for appellant. Let us apply them to the facts under consideration. The rights of the Last Chance location are to be considered as if the Last Chance had originally received all the rights which it would have received had there been no other location on any portion of the same territory, and had then by grant conveyed to the New York everything which the New York now has title to. This is the effect of the citations from Washburn. Now, if the Last Chance were the only claim upon the lode, it would have received, as we have already said, that portion of the vein marked, on Fig. B, by the letters m—m, n—n. If it had then granted to the New York all of the vein the New York now owns, included within the Last Chance location, it would have granted that figure marked by the intersecting lines j—k, m—n; and it would have retained as belonging to the Last Chance, all the residue of that portion of the vein included within the lines m—m, n—n; and this, we think, upon the principles announced by Mr. Washburn, to be the true situation as to these claims. But what does it leave for the Del Monte? Absolutely nothing; because the Del Monte has no portion of the apex. The apex is wholly owned

by other claimants and the conflicting rights are not between the Del Monte and the Last Chance, nor between the Del Monte and the New York, but are between the New York on the one part, as the owner of a portion of the apex, and the Last Chance on the other part as the owner of the residue of the apex; the conflicting portion of the vein on its dip being marked by the triangle, bounded on the south by the line m—n, and on the north by the line j—k, which portion goes to the New York by reason of its seniority of title.

These principles may be applied to each one of the several figures which counsel for appellant used in the Court of Appeals, and will probably use in this Court, to illustrate their theory. While no one of these figures correctly shows the true relations of the Last Chance, the New York and the Del Monte, yet they may be considered for the purpose intended of showing the possible consequences of the relations of mining claims one to another. We have attached hereto four blue-prints, each of which is an elaboration of the corresponding blue-print in the brief of appellant's counsel.

Applying the principles we have been discussing to appellants "Fig. 1," it is manifest that the New York, as the senior claim of the two, would own that portion of the vein marked j—j, k—k, being so much of the vein on its downward course into earth as the claim has of the apex within its *location*. Also, that the Last Chance claim, in this imaginary case, would have all the vein marked by the figures m—m, n—n, excepting that portion in conflict with the previous grant to the New York. That is to say, that the Last Chance claim would have as much of the vein at any depth as it has of the apex within its *location*, excluding only the por-

tion claimed by the other apex claimant by senior right.

Taking "Fig. 2." and assuming that the New York location is laid transversely upon the vein, so that the apex of the vein crosses the two side-lines as located, which thereby, under the decisions of this Court, become the end-lines, then it is apparent that the right of descent into the earth upon the vein, for the New York, would be shown by the lines j—j, k—k, in "Fig. 2." But, again, as before, the Last Chance would have the figure m—m, n—n, subject only to an exclusion in favor of the senior claimant—being entitled as before, to as much of the vein on its dip as there is of the apex, within its location, except as to that portion thereof owned by a senior apex claimant. So, again, with "Fig. 3," already referred to—the Del Monte, as the senior of the three claims, has, as already suggested, as much of the vein as it has of the apex within its location, which will be shown by the figure f—f, g—g; the New York claim in this imaginary position of the claims, would be entitled to follow the vein as shown by the lines marked j—j, k—k, except that it could not take that portion thereof which belongs to the Del Monte, but all the residue of the vein it would have the right to take, bounded only by the lines mentioned. In other words, it again would have as much of the vein as it has of its apex, excluding only that part belonging to the senior in rank, and in this figure the Last Chance, as the third in rank, would be entitled to all of the vein m—m, n—n, except that which had been granted to those older in right, for it would take as much of the vein as there is of the apex within its location, excluding only those parts previously granted to others. In "Fig. 4", the portion of the vein which would be available to the Last

Chance would be much greater than under "Fig. 3", for, again applying the same principles, the Last Chance, which has within the boundaries of its location the apex of the vein from end-line to end-line, would have as much of the vein in its downward course into the earth as it has of its apex, except the portions thereof previously granted to the Del Monte and to the New York, represented by the two triangles at either end of the Last Chance lode.

We respectfully submit that there is no case imaginable of different locations upon the apex of the same physical vein, whatever its meanderings, and whatever direction end-lines of the several locations may take, but what become simple and with rights easily ascertained, when this fundamental principle is once recognized, under the statute, to-wit: That each apex claimant owns as much of the vein at any depth as there is of its apex within the *lines of his location*, subject only to prior grants out of the same estate made by the Government to others. In other words, that any junior claimant has as much of the vein for its entire depth, as he would have had, had he been the senior patentee for his full claim and "section of lode," and had then conveyed to the overlapping claimants their several portions out of the estate thus conveyed to him.

CONCLUSION.

If the foregoing argument is sound, then the correct answers to the questions propounded by the Circuit Court of Appeals are obvious.

As necessary deductions from the facts set forth in the Record, and from the mining statutes, we confidently contend:

1. The substance of the grant made by the Government to the locator of a lode claim is the mineral deposit beneath the surface. Prior to the extraction of the ores, the extent of the deposit to be conveyed can be measured or defined *only* by surface survey lines, through which imaginary planes are drawn. Such survey lines do not invade the right of exclusive possession and enjoyment of the surface granted by statute to the senior proprietor. Such lines occupy no actual surface space of length or breadth. They are, however, the only practicable means of marking the "section of the lode" claimed by the junior locator. They mark the exterior boundaries, within which the rights of the junior locator are confined. The extent of his rights within these exterior boundaries is readily ascertained by excluding from the whole that which has already been granted or reserved to others. By this process no right of the senior locator is invaded. By no other process can the junior locator obtain what the law offers him.

Therefore, the lines of a junior lode location *may* be laid upon or across the surface of a valid senior location, for the purpose of defining for, or securing to, such junior location underground or extra-lateral rights, *not in conflict* with any rights of the senior location.

2. "A grant specifically describing only the two irregular tracts which constitute the granted *surface* of the Last Chance claim," would, in effect, correspond to a conveyance of like pieces of farming land, or town lots. All rights in each piece would be confined within vertical planes drawn through the several surface boundaries.

The property which the locators of the Last Chance asked for, and which the law offered to

them, was a "section of the lode" 1,278 feet long, and surface ground 300 feet wide, except so much of either, within the designated limits, as belonged to others.

If the end-lines of the New York were parallel with the end-lines of the Last Chance, then the premises excluded from the latter would have the same length on the surface and underground. If—as is, in fact, the case—the end-lines of one are not parallel with those of the other claim, then the corresponding vertical planes will take different directions, as they cut the vein on its dip, with the necessary result that the longitudinal extent of the *exclusion* will increase or diminish as depth is gained. If the dip of the Last Chance vein were to the east (being on the concave side of the curved line of apex), then the exclusion in favor of the New York would take a greater length underground than at the surface, and the residuum granted to the Last Chance would be shorter on the vein underground than at the surface. (As illustrated by Fig. D.)

On the other hand, however, the dip of the vein *is* to the west (or on the convex side of the curved line of apex). The inevitable result is that the excluded portion of the vein has a length which decreases with depth, while the residuum of the vein left to the Last Chance increases with depth, until it reaches its maximum, at the vertical plane drawn through the south end-line of the Last Chance *survey*. (As illustrated by Fig. B.)

Therefore, in the present case, the Last Chance patent, by first describing the rectangular claim and the lode therein in full, and granting all thereof, *except* the premises previously granted to the New York, does convey to the patentee more of the lode than would be conveyed by a mere description of the two irregular tracts of surface ground.

3. The "end-lines" of a lode mining *claim*, within the meaning of Revised Statutes, Sections 2320 and 2322, are the end-lines of the full claim included within the exterior boundaries of the survey of location. The term is not applied to the surface boundaries of "portions" of a claim, which may be patented to different parties. The end-lines mentioned by the statute are voluntary end-lines, fixed by the locator of the claim. They are not the lines fixed by an adverse claimant to mark a different and conflicting claim.

Therefore, the easterly *side* of the New York lode mining claim is *not* an "end-line" of the Last Chance claim, within the meaning of Sections 2320 and 2322 of the Revised Statutes of the United States.

4. If the foregoing conclusions are sound, then the fourth query propounded by the Court of Appeals is immaterial, as affecting the rights of the parties to this action. The answer to the question is, however, clear.

If a lode mining claim is so laid upon a vein that one surface end-line crosses the apex of the vein and the side-lines extending from such end-line run substantially parallel with the course of the apex, and so continue for several hundred feet, then certainly the claim is located "along the vein or lode," within the meaning of Revised Statutes, Section 2320.

If, then, by an angle in the side-line or a change of course of the apex of the vein, the latter passes out of the boundaries of the claim, it is nevertheless true that from the point where the apex enters across the end-line to the point where it departs across the side-line, the apex of the vein is *inside* the "surface lines extended downward

vertically." The statute, however, (Section 2322) expressly gives extra-lateral rights to the owners of all veins having their apexes "inside" such lines.

It necessarily follows, that if the apex of a vein crosses one end-line and one side-line of a lode mining claim, as located thereon, the locator of such vein may follow it, upon its dip beyond the vertical side-line of his location.

5. It follows also, as a necessary deduction, that on the facts presented by the record in this cause, the appellee *has the right* to follow its vein downward, beyond its west side-line and under the surface of the premises of appellant.

Mining litigation as to extra-lateral rights often (as in this case) arises from the contention that the owner of overlying surface—who is not the discoverer, and owns no portion of the apex of a vein—is better entitled to the ores than he who discovered the vein, and does own its apex.

The law intends to reward the *discoverer*; and as discoveries are almost invariably made upon the apex, it does this by giving to the owner of the apex, the ownership of the vein to any depth.

In discussing the various questions propounded by the Circuit Court of Appeals, we have endeavored to cover the whole subject matter. We believe the principles we have urged to be entirely sound. They will, when recognized and applied, solve numerous difficulties which, after all, are but imaginary, and yet which constantly arise, through the contentions of mere surface owners, against the rights of apex owners.

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JOEL F. VAILE,

Counsel for Appellee.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

IN

THE SUPREME COURT

OF THE

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY,
Appellant,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY,
Appellee.

No. 147.
(16,137.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR APPELLEE.

Since printing our main brief in this cause, we have received the brief of the appellant; and some matters there presented suggest the propriety of supplementing our argument, upon certain propositions.

The appellant contends that where the apex of a vein enters across one end-line and passes out

across the side-line of a mining location, the owner of such vein has no extralateral rights. The appellant argues that this is a necessary deduction from decisions heretofore made by this Court. We shall briefly review the authorities upon which this contention rests.

It will be observed, by reference to the maps introduced in evidence, that the Last Chance lode mining claim was located *along* the Last Chance vein; that as to that portion of the Last Chance vein in controversy in this action, the apex runs substantially parallel with the side-lines of the Last Chance location; that it is about midway of the north end-line, in entering the claim from the north, and that it is almost midway between the two parallel side-lines of the location, at the place where it passes out of Last Chance surface territory; that according to the map marked "Exhibit B", in the record, the course of the apex continues within the exterior boundaries of the Last Chance location all the way from the north end-line to a point within four or five feet of the southeast corner of the exterior boundaries of the claim. The Last Chance location therefore is *along* the vein and *not crosswise* of the vein.

If the same vein be considered in relation to the New York location, which has been used for illustration in the argument on both sides, it will be observed that the apex of the vein enters across the south end-line, and that the course of the apex is substantially parallel with the side-lines of the claim, for 1,070 feet out of a total of 1,359 feet of the surface location. The New York location is, therefore, *along* the vein, and is not crosswise of the vein.

Under these circumstances, what is the effect of the authorities cited by counsel?

Mining Co. vs. Tarbet, 98 U. S., 463: This case, commonly known as "the Flagstaff case," is the one in which this Court first decided that if the location is made crosswise of the vein, the side-lines become end-lines, and the end-lines become side-lines. The Court said:

"We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon *lengthwise*, in the general direction of such veins or lodes, on the surface of the earth, where they are discoverable, and that the end-lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction, either way, horizontally; and that the right to follow the dip outside of the side-lines is based on the hypothesis that the direction of those lines corresponds *substantially* with the course of the lode or vein at its apex, on or near the surface. It was not the intent of the law to allow a person to make his location *crosswise* of a vein, so that the side-lines shall cross it, and thereby give him the right to follow the *strike* of the vein outside of his side-lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the *lode*. Their right to follow the dip outside of their side-lines cannot be interfered with by him. His right to the lode only extends *to so much of the lode as his claim covers*. If he has located crosswise of the lode and his claim is only 100 feet wide, that 100 feet is all he has a right to." (Pages 467-8.)

The principle, therefore, which guided the Court in this decision was that the claim should be located lengthwise of the vein, and not across the vein. In the case at bar, the claim is located lengthwise of the vein, and, under no view of the facts, can it be construed as being located cross-wise of the vein.

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 196. This case (commonly known as "the Horse-shoe case") was one where the outcrop took a curved course, and the location was made in such a way as to have fourteen corners. The dip of the lode was on the convex side of the curved line of outcrop, and the vein, upon its descent into the earth, dipped under the surface of the Gilt-Edge lode mining claim. The lines designated by the locator as end-lines were parallel to each other, but, if extended in their own direction, upon the dip of the vein, would not embrace any portion whatever of the vein under the surface of the Gilt-Edge claim. We cannot do better than to quote and adopt the language of the Supreme Court of California in reference to that case, as applicable to the question under consideration. The Supreme Court of California, after citing the case referred to, said:

"The language of the opinion of the Court in that case must be considered in reference to the facts of the case, and the points which were before the Court for decision. The question involved was the right of the defendants therein, who were the owners of a lode location called the Stone claim, to follow a vein, the apex of which was within the surface lines of said claim, into an adjoining claim owned by plaintiffs, called the Gilt-Edge claim. When defendants offered evidence to prove their right to follow their vein into Gilt-Edge ground, the plaintiffs objected, because, 'by reason of the surface *form or shape* of the Stone claim, its owners had no right' to follow, etc., and because 'no part of the Gilt-Edge claim, or the mineral or lode within it, was *within vertical planes drawn downward through the end-lines* of the Stone claim and continued indefinitely in their own direction.' (Pages 202, 203.)

"The objection there was not that the end-lines

of the Stone claim were out of parallel; and, as a matter of fact, what were claimed to be the end-lines *were* parallel. The objection rested on the general 'form or shape' of the Stone surface location, and on the fact that the disputed ore in the Gilt-Edge was not within vertical planes drawn through the end-lines of the Stone claim. The objection was very properly sustained, as a glance at the Stone surface location will at once show. * *

"Here is a surface location, with nearly a dozen exterior lines, with no distinguishable side-lines or end-lines, made in extreme violation of the usages and principles of location recognized by the statutes, and which, if it gave any right to follow a vein at all, would give the right to follow veins in nearly a dozen different directions. The lines which are designated as end-lines are not end-lines at all; the one designated as the south end-line—from the figure 6 to the figure 5—would, if extended, run through the center of the location, and, as stated in the opinion, the ore taken from the Gilt-Edge was not within planes drawn through the asserted end-lines. As was said by the learned judge of the Circuit Court who tried the case: 'With superficial attention to the letter of the law, and in utter ignorance and disregard of its principles, the two lines were made in equal length and parallel with each other, but so arranged that they never can perform the office assigned to them in the law.'"

Doe vs. Sanger, 83 Cal., 203, 211.

In this connection, we suggest that this Court, in deciding the Horseshoe case, used this language:

"The exterior lines of the Stone claim formed a curved figure, somewhat in the shape of a horseshoe, and its end-lines are not and cannot be made parallel. What are marked on the plat as end-lines are not such. The one between numbers 5 and 6 is a side-line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided

figure, and, apparently, for no other reason than their parallelism, called them end-lines." (Page 208.)

The decision in that case was not in any respect based upon the relation of the apex to the side-lines, but was based upon the form and shape of the surface claim, and upon the fact that what the locator designated as his end-lines would not, if extended, embrace the ore in controversy.

It is true, that in the case of *Bluebird Mining Co. vs. Largey*, 49 Fed. Rep., 289, 291, cited by appellant, the district judge said:

"But if it should appear that the apex of the Bluebird vein did not pass through the end-lines of that claim, but passed through one end-line and one side-line, then the rights of plaintiff, at least, are determined by the case of *Iron Silver Mining Co. vs. Elgin Mining and Milling Co.*, 118 U. S., 196."

But this remark, made *arguendo* by that judge, is overruled by his own immediate superior tribunal, to wit, the Court of Appeals for the Ninth Circuit, in cases cited in our original brief; and this Court has, in express terms, held that the question involved has not by this Court been decided, for this Court says:

"It has been held by this Court, in the cases heretofore cited, that where the course of a vein is across instead of lengthwise of the location, the side-lines become the end-lines, and the end-lines the side-lines. *But there has been no decision* as to what extralateral rights exist if a vein enters at an end-line and passes out at a side-line."

The Last Chance M. Co. vs. Tyler M. Co., 157 U. S., 683, 696.

The remark of Judge Knowles, in the Bluebird

case, must, therefore, go for nothing; and it is very apparent that this Court has held that the Horseshoe case does not decide the point for which appellant is contending.

Argentine Co. vs. Terrible Co., 122 U. S., 478, 485. This case but follows the case of *Mining Co. vs. Tarbet*, from which it quotes, and the language of the Court again agrees with our contention, to wit, that extralateral rights are not destroyed unless it shall be found that the location is cross-wise of the vein, instead of being lengthwise of the vein. Thus, the Court says:

"The instruction asked assumes that the longest sides of its claims were their side-lines. Such would undoubtedly be the case if the locations of the claim were *along the course* or strike of the lode. The statute undoubtedty contemplates that the location of the lode or vein claim shall be *along the course* of the lode or vein. [Quoting statute.]

"When, therefore, a mining claim crosses the course of the lode or vein, instead of being 'along the vein or lode', the end-lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side-lines are those which measure the extent of the claim on each side of the middle of the vein at the surface." (Page 485.)

In this case, therefore, the Court does not hold that if the claim is in fact located lengthwise of the lode, it loses any of its extralateral rights; while, on the contrary, the necessary effect of this decision, like that of its predecessors, is that the extralateral rights are preserved, if the location is made, as the law contemplates, lengthwise of the vein.

King vs. Amy & Silversmith Mg. Co., 152 U. S., 222, 228: The Court in this case announces no new

principle, and but follows, in exact terms, the previous decisions. Thus, the Court says:

"In the Amy claim, the lines marked as *side*-lines cross the course of the strike of the vein, and do not run parallel with it. They therefore constitute end-lines."

And, further down, the Court says:

"Where it (the Court) finds, as in this case, that what are called *side*-lines are in fact *end*-lines, the Court in determining his lateral rights, will treat such side-lines as end-lines, and such end-lines as side-lines. But the Court cannot make a new location for him, and thereby enlarge his rights."

This case, therefore, as rightly held in the subsequent *Tyler* case, in 157 U. S., did not decide the question which is now under discussion.

Catron vs. Old, 23 Colo., 433: This case is not at all parallel to the one under consideration. It was a case where an apex of the vein entered across one side-line and then passed out of the same side. It did not cross any end-line; and the Court very clearly shows that it is not deciding the principle involved in our case, by its reference to the case of *The Del Monte Mining and Milling Co. vs. N. Y. and Last Chance Co.*, 66 Fed. Rep. 212, already cited in our principal brief. Referring to that decision, the Supreme Court of Colorado said:

"Explorations had disclosed that the New York vein, in its general course, had within its side-lines the apex for a distance of 1,070 feet. As the vein entered one end-line of the New York claim, the only difficulty found by the District Judge, grew out of the fact that it departed from the side-lines of the claim about 280 feet from the end-line

opposite the place of entrance, the claim being less than the full length allowed by statute. In these circumstances, upon a preliminary application, the learned District Judge held that the owners of the New York were entitled, by reason of their apex rights, to follow the vein in its downward course through the side-lines of the claim, and beneath the surface boundaries of the Del Monte location. While there are some expressions in the opinion which would seem to be in favor of the contention of appellees in this case, if the facts are not considered, yet when it is remembered, that the vein entered one end-line of the New York claim, and extended more than 1,000 feet in a general direction parallel to the side-lines of the claim, it would seem that the decision is hardly in point in this case." (Page 440.)

So that the Court in that case says nothing by way of dissent from the conclusions of Judge Hallett in the Del Monte case.

Referring, however, to decisions that *do* bear upon the question under consideration, we call the attention of this Court to the fact, that every decission (which directly involves the question now at issue), barring the remark made, *obiter*, by Judge Knowles, has been in favor of the contention of the appellee; and these decisions come from judges who are, many of them, of long experience in the interpretation of mining statutes. We take up some of these cases, in chronological order.

Mr. Justice Miller, for so many years a member of this Court, upon the trial of a case in Colorado, in 1879, in instructing the jury, said:

"Now, gentlemen, I have but one more matter, and really I do not know that there is much to be said about that. The defendants maintain that the lines—the side-lines—of the plaintiff's claim are so located, in reference to the shoot or strike of the

vein which they claim to pursue, that he has no right to pursue it at the point where this controversy exists.

You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, *and the course it takes;* and from all that you are to say what is its *general course.* The plaintiff is not bound to lay his side-lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In *such event* his end-lines become his side-lines, and he can only pursue it to his side-lines, vertically extended, as though they were his end-lines; *but* if he happens to strike out diagonally, *as far as his side-lines include the apex*, so far he can pursue it *laterally.*"

Stevens vs. Williams, 1 McCrary, 480, 490.

Judge Thayer, (Judges Caldwell and Shiras sitting with him,) held in accordance with our contention. He says:

"If the vein on which the Colorado Central location rested, became divided as it entered the disputed territory, and the outcrop of one fork crossed into Aliunde territory, then it followed that the Colorado Central claim had been laid rather obliquely to the course of the outcrop, and, in that event, we are of the opinion that the defendant lost that fork of the vein which had passed outside of its side-lines. In other words, so far as that fork is concerned, *the south end line of defendant's Colorado Central claim must be regarded as a line drawn through the point where the outcrop passed through its south side-line.*"

Colo. Cent. Consol. Mg. Co. vs. Turck, 50 Fed. Rep., 888, 896.

Judge Hawley, (Judges McKenna and Gilbert sitting with him,) in the Circuit Court of Appeals

for the Ninth Circuit, supports our contention, in explicit language, as quoted in our main brief at pages 25 and 26.

Tyler Mg. Co. vs. Sweeney, 54 Fed. Rep., 284, 292.

So, again, Judge Hawley, (Judges McKenna and Knowles sitting with him), in the Circuit Court of Appeals for the Ninth Circuit, held to the same effect:

"The lode located by the Tyler in its true course lengthwise crossed the southerly side-line of the location, at a point distant 427 feet from the easterly end-line of the Tyler location. It could not follow the lode lengthwise beyond the point where it crossed its side-line. It abandoned its right to the surface ground beyond that point, and drew its easterly end-line parallel with its location at that point, so as to only include the ground in which the lode extended lengthwise within the side-lines of its location. No valid reason has been advanced by counsel, and we are not aware of any, why the end-line of the claim could not be thus changed in order to comply with the laws of the United States requiring the end-lines to be parallel. *The law itself would make the end-line at that point, so far as any extralateral rights to follow the lode in its downward course were involved.*"

Last Chance M. Co. vs. Tyler M. Co., 61 Fed. Rep., 557, 560.

So again, Judge Hawley, in the Circuit Court for the Northern District of California, says:

"It is a universal rule of construction that the decisions of courts are to be interpreted with reference to the facts in each particular case. In the Amy case, the Court held that the side-lines of the claim constituted the end-lines of the location. Why? Because 'the lines marked as side-lines cross the course of the strike of the vein, and do

not run parallel with it.' It would be a contortion of the facts and of the law to construe the principles announced in the Amy case as applicable to a location like the Ural, where the lode, as located by the surface claim, crosses through the northerly end-line, and runs nearly parallel with the side-lines for a distance of about 1,400 feet, when it changes its course, and crosses the easterly side-line of the surface location, about 600 feet north of the southerly end-line of the location. It cannot, it seems to me, consistently be said that complainant is deprived of any of its extralateral rights to the 1,400 feet, more or less, which is all entirely within the surface lines of the Ural patent and substantially parallel with its side-lines as marked upon the surface ground. The statute of the United States is not, in my opinion, susceptible of any such construction, and no decision of any national or state court has ever gone to that extent. The Supreme Court of the United States in the Amy case simply decided that when a mining claim is located *across*, instead of *along*, the lode, its side-lines must be treated as its end-lines, and its end-lines as its side-lines; so that, under *Rev. St.*, section 2322, the dip cannot be followed outside the vertical plane of the original side-lines into an adjoining claim."

Consol. Wyoming G. M. Co. vs. Champion M. Co., 63 Fed., 540, 547.

Judge Hallett, in the Circuit Court for Colorado, holds the same doctrine very clearly, in a case already cited in our principal brief, at page 21.

Del Monte M. & M. Co. vs. N. Y. & L. C. M. Co., 66 Fed. Rep., 212.

Judge Beatty, in the Circuit Court for Idaho, says:

"The right granted is to follow it [the vein] downward wherever it may go, regardless of the vertical planes of its side-lines, and for a length along its course equal to the length of apex within

his surface limits, restricted only by the vertical extended planes of his end-lines. What reason, under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that the ledge must run from end to end, but he is granted this right of following 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner. Courts will not fritter them away by ingrafting into the law antagonistic common-law principles, or other judicial legislation."

> Tyler M. Co. vs. Last Chance M. Co., 71 Fed. Rep., 848, 851.

Judge Beatty again, sitting in the Northern District of California, held in the same way, in a later case.

> Carson City G. & S. M. Co. vs. North Star M. Co., 73 Fed., 597, 602.

Judge Hawley, (Judges Gilbert and Ross sitting with him) in the Circuit Court of Appeals for the Ninth Circuit, held the same way again, in a very recent case:

> Republican Mining Co. vs. Tyler Mining Co., 79 Fed. Rep., 733.

We confidently insist that, both upon reason and upon authority, the appellee's contention should be sustained, and that a locator whose loca-

cation is lengthwise of a vein, the apex of which crosses his end-line and runs substantially parallel with his side lines, has the extralateral right upon the dip of that vein, for as much of the vein in horizontal length, at any depth, as he has of the apex within his surface location, subject to any superior rights of other apex claimants.

APPELLANT'S MISCONCEPTIONS.

Our main brief in this court is very largely a reprint of our brief in the Court of Appeals. We had supposed that we had made our meaning very clear; but it would seem, from certain language in the appellant's brief, that we are not correctly understood by the appellant.

At page 15, of the appellant's brief, it is said:

"If the absurdity [of appellee's contention] is based upon some supposed necessity, the latter is equally absurd, for if the government may confirm a second grantee in the ownership of something it has *already granted*, it certainly would be remiss if it did not also collect the statutory compensation therefor, from the second as well as from the first grantee."

We have never contended that the second grantee obtained anything which had been already granted. We do contend, that in order to obtain that which has not been already granted, it may be necessary to lay survey lines upon territory already appropriated.

Section 2319 of the Revised Statutes provides for the purchase of two entirely distinct things: One, the mineral deposit; the other, the lands containing the mineral deposit. The language of the statute is as follows:

"Section 2319. All valuable *mineral deposits*, in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and *purchase*, and *the lands* in which they are found to occupation and *purchase*, by citizens of the United States."

For illustration, let us take appellant's Fig. 4, as the same is elaborated in the corresponding figure, given in appellee's brief. In that case the senior claim has appropriated and owns all that portion of the vein marked by the lines "f—f," and that line measures the extent of the first appropriation, for any depth into the earth. So, again, the second in rank has appropriated so much of the vein as is marked by the lines "j—j," and that measures the extent to which the second locator is entitled, at any depth, upon the vein. There is left, however, between the two locations, something for a third locator. It measures, in the illustration used, about 600 feet of apex; but, as the vein descends into the earth, the extent of *un*appropriated vein increases, by reason of the diverging lines of the other two locators. But this unappropriated vein, at any depth, is subject to appropriation and purchase, under Section 2319. A man who would obtain it, however, finds himself bound by certain statutory provisions: 1st, he cannot take more than 1,500 feet of it, at any depth; 2d, he cannot locate it at all, without a *discovery*, which he will make on the line of free apex; then his location lines must be so located as not to be more than 150 feet on each side of the middle of that vein, at the surface. Therefore, to appropriate this hitherto unappropriated mineral deposit, lying in the depths of the earth, he must mark what he wants by some surface lines. He does that by drawing a rectangle, which overlaps, indeed, the first and second loca-

tions, but which does not, by that means, interrupt the enjoyment and possession of his neighbors. But the vertical planes drawn through the end-lines of his rectangle, will mark the section of the lode which, at any depth in the earth, will mark out his portion of the mineral deposit which the law says he may purchase; and it does this by taking his whole rectangle, and the segment of the lode included between the vertical planes drawn through his end lines, and simply excluding therefrom the portion of the lode, and of the surface, which has already been granted to others. Certainly that which has not been granted to others is open to him; and the only way by which he can designate it is by his lines, laid upon the surface. By this process he does not take anything which has been granted to another; he takes that which is left as public property, after the grants to others have been fully satisfied.

At page 17, speaking of patents under the law of 1866, appellant says:

"Ostensibly, this language would seem to be a grant of 1,500 feet in length of the lode located, irrespective of the amount of surface ground covered by the patent. Such a thing was, however, *practically impossible*, under the act of May 10, 1872, and the grant of the vein, in terms, was mere surplusage, for the section of the vein included within the surface ground covered by the grant, whether more or less in length than such surface ground, passed with the grant."

The meaning of the last part of this sentence is not entirely clear to us; but we insist that it is *not* "practically impossible" to convey 1,500 feet in length of the lode, even though there be not so much left of the surface, provided there be, underground, as much as 1,500 feet of the lode left un-

appropriated by others; for, as above suggested, this underground mineral deposit is, of itself, a subject of purchase, and may be obtained to the full extent allowed by law, even though the extent of unappropriated apex is less than that of the unappropriated lode at depth in the earth. There is absolutely no provision in the law, anywhere, that the length of unappropriated apex shall limit the discoverer's right to the unappropriated vein on the dip. The only limitation upon the latter, is that it shall not exceed 1,500 feet in length.

"Any *portion* of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title; for while the owner of a vein may follow it in its descent into another's territory beyond his own side lines, he cannot beyond his end-lines, and *the vein beyond those end-lines* is subject to further discovery and appropriation."

Larkin vs. Upton, 144 U. S., 19, 23.

At page 21, of appellant's brief, speaking of our contention that a description of the entire Last Chance rectangle and section of the lode, and a conveyance of the same with an exclusion of previously granted territory, gives us a greater right underground than if only the unappropriated surface had been described, counsel says:

"This extraordinary claim not only *ignores* the grant of the New York claim, which is older in time, as well as in right, and which is just as broad in its terms as the other, but it overlooks as well the express terms of its own grant. The patent, after describing the boundaries of the original application, and the extent of the exception and exclusion therefrom, declares in terms, that 'The granted premises in said lot contain five acres and twenty-five hundredths of an acre, more or less.' It also declares that 'There is granted to Granger

et al, the mining premises hereinbefore described, and not expressly excepted from these presents.'"

Our claim does not in the slightest degree ignore the grant to the New York claim, but fully recognizes it, as we are bound to do under our patent. On page 5, of the record, it is stated that we had entered and paid for the mining claim or premises known as the Last Chance lode mining claim, and then follows a description of the entire rectangle, closing, at the bottom of page 5, after a full description of the entire rectangle, with these words:

"Expressly excepting and excluding from these presents all that portion of the ground hereinabove described, embraced in said mining claim or survey No. 7406, and also all that portion of said Last Chance vein or lode, and of all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground, said lot No. 7263–A extending 1278.34 feet in length *along said Last Chance vein or lode*, the granted premises in said lot containing five acres and twenty-five hundredths of an acre, more or less."

The next clause expressly grants to the patentees "The said mining premises hereinbefore described and not expressly excepted from these presents;" but, as shown in Fig. "B" in appellee's brief, all that was, or could be excluded from the last chance rectangle and the section of the lode measured by it, would be the portion granted to the New York, shown by the apex line "j—j," and the same extent of vein, at any depth in the earth, upon its dip. When we say, therefore, that we received all that our entire rectangle and section of the lode would call for, *except* that which has been granted to the New York, we do not ignore the grant to the New York, nor do we claim any

more for ourselves than our patent expressly conveys.

So again, on page 25, the appellant says:

"We have yet to find an authority in support of the proposition that an exception like the one under consideration does not except, that such an exclusion does not exclude and, that, in spite of its terms, the appellee has within the New York an end-line, and extralateral rights based thereon, by which it may *invade the territory* of others and remove ores from their mines, under a pretense of ownership *expressly denied* it by the Government.

"It is hardly possible that expressions like these become meaningless, when applied to the exceptions and exclusions contained in a mining patent; and yet they must be, if the appellee has vested rights for any purpose, in any part of the ground excluded from its grant."

As already said, we fully admit the exception. We exclude that which the patent excludes. But, because we exclude that which has already been granted to another, it does not mean that we must exclude another large portion of the mineral deposit, which we would be entitled to take if the New York were not there. An exclusion of that which belongs to the New York does not require a further and additional exclusion in favor of some adjacent surface proprietor. We do not claim any "vested rights," for any purpose, in any part of the ground excluded from our grant. The running of a survey line, as already abundantly argued, takes no right from anybody else. It is simply a method of designating where our underground rights would terminate. The exclusion is as definite and precise as it can be made by description; and the residuum left, after the exclusion, is as definitely and positively known as if it had been separately described as a fragment; while, by reason of the three dimen-

sions involved, it is much more easily described by the rule of exclusion than in any other method.

Overlapping surveys have been recognized and positively directed by the Land Department ever since the law of May 10, 1872, was enacted, as illustrated by the circulars and decisions printed in the appendix to this brief.

On page 31 of appellant's brief, counsel says, that under appellee's theory—

"[1.] It is impossible to conceive of any fractional piece of ground, however shaped, and surrounded by old and valid locations, which cannot be located by throwing imaginary boundaries across private property, and [2] so juggling with them, subsequently as to give its owner the right to go beyond his boundaries, regardless of rights previously secured by such older locations."

The first clause in this proposition is true; and we insist that the law contemplates that however irregular a piece of surface ground, containing a vein, may be, it may be located, and that any unappropriated vein which apexes within it may be located, of course, without invading, as we could not invade, the rights of other appropriators of the same vein or any portion thereof. It is the unappropriated portion that may be taken, and this without regard to the form of unappropriated surface; provided the apex of the vein be within it.

It is not true that, by any process of "juggling" with lines, under our contention, the owner of the fractional surface would obtain the right to go beyond his boundaries, regardless of rights previously secured by such older locations. On the contrary, those rights would be thoroughly protected by the prior grant, and it is only that which is left, with defined boundaries—which may, however be different underground from what they are on the sur-

face—which the junior locator may take; and no "juggling" of lines can in any way impair the rights of senior locators. We have already said in our principal brief, and beg leave to repeat, that if the principles which we have announced be applied in the construction of mining rights, "there is no case imaginable of different locations upon the apex of the same physical vein, whatever its meanderings, and whatever direction the end-lines of the several locations may take, but what becomes simple and with rights easily ascertained." (See page 38 of principal brief.)

Again, appellant says, at page 38 of his brief:

"All he [the appellee] does assert, is a right to go back to his 'line of location,' identify it, and then shove it north for 800 feet."

Counsel entirely misstates our position. We do not shift the south end-line in the slightest degree. We say that between the north end-line and the south end-line of the rectangular location we have everything, surface and vein, which has not been previously appropriated; and that means the entire rectangular surface, and entire section of the lode, remaining, after excluding from it so much of the surface as is within the New York location, and so much of the Last Chance vein, and other veins as *apex within the New York location.* Everything else included between our two end-lines of location we claim, and it was granted to us, in express terms, by our patent, pursuant to law.

On the same and following pages, the appellant's counsel says:

"Yet they (the appellee) are contending for a location, one-half which has been adjudicated to be worthless, and for which patent has been issued to another."

Nay, not so. We claim nothing that has been adjudicated to another. We claim all, however, that would be included within our own location, *except that* which has been adjudicated to another; this, and no more.

There is no contention between the owners of the Last Chance and the owners of the New York. The rights of each are well defined, and do not in the slightest degree conflict.

At page 40, of appellant's brief, counsel says:

"[Appellee] discovered a vein leaving the Amethyst south end-line, and running southerly into the north side-line of the New York. Its unappropriated length was about 700 feet. They might have located a rectangular claim 700 feet long upon it, if they had desired, without trespassing upon a foot of private property. They preferred to make a claim to 1,500 feet of it instead, and thus rob the New York of 800 feet of its vein. They failed. Can they now be heard to say that the New York side-line is not their south end-line, or that they may still claim their end-line, when they saw fit to take it, notwithstanding the adjudications of the courts? Such a proposition is monstrous."

This paragraph of appellant's brief goes outside of the record in its statement of fact; and, in doing so, falls into an error of fact. But, in a discussion of the legal question involved, this is immaterial. We suggest, however, in passing, that it is rather a singular argument, that if we had drawn an end-line 700 feet south of our north end-line and parallel with the latter, we would have extralateral rights and would be entitled to the ore in controversy, under the Del Monte claim; but that, by drawing our line at a point *more* than 700 feet south, although parallel with our north end-line, we have no extralateral rights whatever. The argument at

once suggests that the Del Monte has no claim to this ore, except through reliance upon what is contended to be a technical failure to comply with the law, on the part of the appellee, which technical failure, however, if our argument is sound, does not exist.

But assuming that the New York had not only located, but had patented, its claim, prior to the location of the Last Chance, yet the lines over the surface of the New York claim would not or could not rob it of 800 feet, or any portion, of its vein; and, as already suggested, would be but a method of designating the section of the lode which the Last Chance desired to obtain, subject to the rights of the New York. The locators of the Last Chance, on the assumption stated, would necessarily know that the northerly limits of the New York rights upon the vein in controversy would either be the New York north end-line or a line parallel with the New York end-lines; and in either event, that line as it followed westwardly on the dip of the vein, would diverge from the course of the Last Chance end-line. The unappropriated mineral deposit would therefore, as the Last Chance locators must well know, have a much greater extent underground than at the surface, and being unappropriated, was subject to location by a discoverer of that vein who should hold any portion of its apex. In order, therefore, to appropriate this underground mineral deposit upon this vein, it would be necessary, as already abundantly argued, to place the line which was intended to mark the southern vertical plane of the Last Chance, at such a distance south of the north end-line of the Last Chance as to include the full section of the lode underground which might then remain unappropriated. This could not rob the senior locator,

because his rights would be preserved by his prior grant. But it would take, of the vein, *whatever is left* within the section of 1,500 feet in length—all that the senior locator *had not* appropriated.

Throughout the entire argument of appellant, there is an assumption of some trespass by the owners of the Last Chance upon the claim of the New York, and one would suppose, from the line of argument used, that the appellant in this case was the New York. But it is not. The Del Monte claims adversely to the New York as well as to the Last Chance, and has litigation pending with the New York company. As already suggested, there is no controversy between the Last Chance and the New York, who, between them, hold the entire apex of the vein in controversy, from the north end-line of the Last Chance, to the south end-line of the New York. This vein could never be acquired by the owners of the Del Monte, under the mining laws of the United States. Not by discovery, because there could not be a discovery within the surface boundaries of the Del Monte, in such a way as to comply with the provision of the law which says that the claim shall be not more than 150 feet on each side of the middle of the vein *at the surface*. The Del Monte obtained its patent, not by virtue of a discovery of this vein, but by virtue of the discovery of some other vein not here in controversy. But, in taking its patent for its territory, by virtue of the discovery of such other vein, it took it subject to this express provision in its patent; to-wit:

"That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundaries of said granted premises, should the same, in its dip, be found to penetrate, intersect or extend into said

premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge." (Printed record, page 4.)

By the very terms, therefore, of the Del Monte patent, it took its title subject to the right of the owners of the Last Chance vein to follow that vein, upon its dip, under the surface of the Del Monte, and to extract and remove the ore therefrom.

We respectfully insist that under no construction of the mining laws of the United States can the Del Monte be awarded the ores situated in the Last Chance vein, and lying between the two vertical planes, one drawn through the north end-line of the Last Chance, and the other through " the north compromise line."

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Counsel for Appellee.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Nov. 5, 1874.

T. B. SEARIGHT, ESQ., Surveyor General, Colo.:

* * * * * * *

In this connection, I would state that the surveyor general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim, *as located*, if held by him in accordance with the local laws and Congressional enactments.

If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other.

* * * * * * *

Very respectfully,

S. S. BURDETT, *Commissioner*.

1 Copp's Land Owner, page 133.

MINES AND MINERALS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., Nov. 16, 1882.

TO UNITED STATES SURVEYORS GENERAL:

The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

1. The *exterior boundaries* of the *claim* should be represented on the plat of survey and in the field notes.

2. The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

3. *Conflicts* with unsurveyed claims, where the applicant for survey *does not claim* the area in conflict, *should be shown* by actual survey.

4. The total area of the claim embraced by the *exterior boundaries* should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

Total area of claim..... 10.50 acres
Area in conflict with survey No. 302.... 1.56 "
Area in conflict with survey No. 948.... 2.33 "
Area in conflict with Mountain Maid lode mining claim, unsurveyed .. 1.48 "

In a number of instances that have come to the attention of this office, the total area in conflict has been given, but not the area in conflict with *each* intersecting claim. The portion of the plat not in conflict has been colored and the remainder left uncolored. The language of the field-notes has been such as to convey the idea that the conflicting areas were excluded from the claim, whereas such was not the intention. It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys, the areas of conflict are to be excluded. The field-notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms. A survey executed as in the example given will enable the applicant for patent to exclude such conflicts as may seem desirable. For instance, the conflict with Survey No. 302 and with the Mountain

Maid lode claim might be excluded and that with Survey No. 948 included.

Your attention is also invited to another matter. The practice of coloring portions of surveys, leaving other portions uncolored, is open to the same objections that have been stated concerning the field-notes. In the future no coloring will be used.

N. C. McFarland,
Commissioner.

Copp's Land-Owner, Vol. IX., page 162.
1 L. Dec., 551.

Grand Dipper Lode.

Acting Commissioner Harrison to United States Surveyor General Robbins, Tucson, Arizona, August 2, 1883:

* * * * * * * *

You state, and it is shown to be so by said diagram, that the said Grand Dipper Lode, so *located*, is a four-sided figure, with parallel end lines, the provisions of Sec. 2320, U. S. Revised Statutes, being fully complied with.

The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald Lode, the easterly end-line of the Emerald claim thus becoming one of the boundary lines of the said "Grand Dipper," and not parallel to the easterly end-line of the Grand Dipper survey.

I cannot see how you can give your approval to such survey. No reason exists why the survey lines should not conform directly to the lines of the *location*, they being properly run in the first instance. The instructions of this office, to be found in Vol. 1, page 133, Copp's Land Owner (Copp's Min. Lands, 2 Ed., page 217), are intended to meet just such a contingency, and that conflicts with other claims may be clearly shown and not avoided, you will find there laid down, the manner in which intersections with conflicting claims may be noted,

and of the running of courses and distances from such points of intersection to establish corners of such conflicting claims." * * * * * * * * *

10 Copp's Land Owner, p. 240.

See, also—

Second paragraph circular December 4, 1884, printed in appendix to appellant's brief.

3 L. Dec., 540.

BLACK DIAMOND LODE.

(Syllabus:)

"For the purpose of including ground held and claimed under a lode location, which was made upon public land, and valid when made, the end-line of the survey of said lode claim may be established within the boundaries of a *patented* placer."

22 L. D., 284.

No. 147.

Add'l Brf. of Wolcott & Vaile for
Appellee (by Leave)
IN

THE SUPREME COURT

Filed Dec. 28, 1897.

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY, *Appellant*,
vs.
THE LAST CHANCE MINING AND MILLING COMPANY, *Appellee*.

No. 147.
(16,237.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLEE'S COMMENTS ON THE CASE OF STRATTON vs. THE GOLD SOVEREIGN M. & T. CO.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Solicitors for Appellee.

IN

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THE DEL MONTE MINING AND MILLING COMPANY, *Appellant*,

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With the consent of the Court, the appellant has, since the oral argument, filed as an authority in its behalf a decision by Judge Hallett in the case of *W. S. Stratton vs. The Gold Sovereign Mining and Tunnel Company*, said decision having been

rendered on December 6, 1897. When properly understood, we cannot see how this decision can in any way be an authority for the appellant.

So far as relates to the contention of the appellant that the survey lines of a junior location can not, for any purpose, be laid within the surface lines of a senior location, it is very certain that Judge Hallett was not intending in this last decision to in any way modify the views which he expressed in the Del Monte case now at bar, as set forth in his opinion found at page 15 of the appellee's principal brief in this cause, and as to no other question involved can the Stratton case be fairly urged as an authority.

In the Stratton case, the Logan location, belonging to Mr. Stratton, was prior in time to the date of the location of the tunnel site, and as the Logan claim was subsequently patented, its rights relate back to the date of its location, for every purpose of conflict and ownership of ores within that location.

The owners of the tunnel were driving an excavation into the territory of the Logan.

The Court says :

"Complainant alleges that he has discovered *good ore* in his *Logan location*, and that respondents intend to assert title *to it* whenever they can reach it through and by means of their tunnel."

The Court also says :

"It appears that the tunnel is being driven by respondents for the purpose of discovering lodes in the line thereof, and that they intend to assert title to such as may be discovered in the tunnel, under the Act of Congress, *within complainant's location*, and elsewhere."

And the only question presented was,

"Whether this may be done as against a valid location on the surface of *earlier date* than the tunnel location?"

Counsel for appellant probably relies upon certain expressions used in the decision, as, for example, "During the lawful occupancy and enjoyment of the locator or owner, who shall obtain from the government a patent, nothing can be done within the claim which shall be or become the *basis* of another location. *Gwillim vs. Donnellan.*"

The "basis" of a location is its *discovery* made on unappropriated public domain. The lines that mark the surface limits of the claim are not the basis of location, but they are the means by which the extent and direction of the claim are marked for underground as well as surface purposes, and they are laid after the "basis" is fixed. It is the point of *discovery* which is the basis of a location. In the Stratton case, this discovery on the part of the tunnel claimants had not been made. They were hunting for such a basis, and in doing so were going into the appropriated land of another whose rights were senior to the tunnel. Certainly there is nothing in this that relates to the question at bar, where the Last Chance discovery is a valid one, and the question is as to the extralateral ownership on the vein, on the apex of which the Last Chance was located on unappropriated public domain.

So, again, in the Stratton case, the Court says:

"Section 2322 provides that the locators of claims, pursuant to Section 2320, shall have the exclusive right of possession and enjoyment of the

surface, and of all veins throughout their entire depth the tops or apexes of which lie inside their surface lines, which includes all ore within the claim, *excepting such as may outcrop in adjacent territory and pass with other locations.*"

In the case at bar the ore in controversy does not outcrop within the Del Monte, but does outcrop in adjacent territory, and, as we contend, passed with the location of the Last Chance claim; and the Del Monte, therefore, had no claim to this ore so outcropping in adjacent territory.

In the Stratton case, the whole decision went upon the assumption that the respondents, by virtue of the junior tunnel location, proposed to take ores from the senior lode location.

The Court says :

"So long as respondents assert the *right* to *take the ores of the Logan location*, through and by means of their tunnel, they cannot be heard to say that they have not such intention, but their purpose is to go beyond in search of greener fields and pastures new."

It would seem that the counsel for appellant, in citing the Stratton case as an authority, still adhere to the misconception of this case which was suggested in our supplemental brief, to wit : that the junior location (the Last Chance) in some way invades the possession of the senior location (the New York), and that it is only by virtue of such invasion of a senior claim that extralateral rights are obtained as against the appellant (Del Monte).

In the case at bar, the decision of the rights of the parties, in the first place, does not involve any element of conflict between the New York and the Last Chance. The Last Chance claims as against

the Del Monte only so much, in longitudinal extent, of the Last Chance vein under Del Monte surface as it has longitudinal extent of apex within the surface of which it is the exclusive owner.

As to the question, however, asked by the Circuit Court of Appeals, as to whether the lines of a junior location may be laid within the surface boundaries of a senior location, for the purpose of securing to the junior location extralateral rights *not in conflict* with any rights of a senior location, we suggest that this Stratton case holds, that even the blasting of a hole in the solid granite of the mountain, not in itself amounting to taking of ore, or anything of value, will not be enjoined; and the intimation is very plain that the amount of damages in such a case would be nominal. How much more is that true as to the laying of surface survey lines over the property of a senior proprietor, such lines occupying no breadth or thickness, and in no way affecting the possession or right of the senior claimant? As to this question, asked by the Court of Appeals, there is certainly nothing in the Stratton case which, in the slightest degree, militates against our contention, that where there are two overlapping lode mining claims, located on the same vein, the senior claim has its entire section of the lode, both on the surface and under ground, and the junior location has its entire section of the lode, both on the surface and under ground, *except* that portion thereof which had been granted to the senior claimant, and that this exclusion, according to the relation of course and dip of vein to the vertical planes drawn through end-lines,

may be greater underground than on the surface, or, on the other hand, may be greater on the surface than underground; but where the two locations are made upon the same vein, which has a curved line of apex, and the dip of the vein is on the convex side of that curved line of apex, the effect of the exclusion may leave to the junior claimant a greater extent underground than at the surface, although at no depth can his longitudinal extent exceed "1,500 feet in length along the vein or lode."

Revised Stats. U. S., Section 2320.

We respectfully submit that the Stratton case does not, in the slightest degree, militate against any of the contentions urged by the appellee in the briefs or upon the oral argument in this cause.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Solicitors for Appellee.